Supreme Court, U.S.
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No. 95-2000

In The

Supreme Court of the United States

October Term, 1995

SCOTT D. LEVINE, M.D.,

Petitioner,

vs.

CENTRAL FLORIDA MEDICAL AFFILIATES, INC.; HEALTHCHOICE, INC.; SAND LAKE HOSPITAL; ORLANDO REGIONAL HEALTHCARE SYSTEM, INC. f/k/a ORLANDO REGIONAL MEDICAL CENTER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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13 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

REPLY ARGUMENT 1

I. THE RECURRING ISSUE PRESENTED BY THIS CASE IS WHETHER A MARKET SHARE SCREEN SHOULD BE USED IN HORIZONTAL BOYCOTT CASES WHERE THE BOYCOTT LIMITS PRICE AND SERVICE COMPETITION AND CONSUMER CHOICE 1

II. PETITIONER IS NOT CHALLENGING ALL JOINT SELLING VENTURES OR ALL MANAGED CARE SYSTEMS 5

III. RESPONDENTS' ARGUMENT THAT CFMA DID NOT PROMULGATE THE "RULE OF NECESSITY," IS REFUTED BY THE DOCUMENTARY RECORD 6

IV. CFMA AND HEALTHCHOICE ARE INSTRUMENTALITIES OF EACH OTHER..... 7

V. PETITIONER PLAINLY RAISED PRICE-FIXING IN BOTH LOWER COURTS, AND THE ELEVENTH CIRCUIT'S REJECTION OF THAT CLAIM SHOULD BE SUMMARILY REVERSED OR VACATED..... 8

CONCLUSION 10

TABLE OF CITATIONS

Supreme Court Cases

American Medical Assn. v. United States, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943)..... 3

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925 (1980)..... 9

Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600, 34 S.Ct. 951 (1914)..... 3

Fashion Originators' Guild of America v. F.T.C., 312 U.S. 457, 61 S.Ct. 703 (1941)..... 3

F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009 (1986)..... 1, 2

F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 110 S.Ct. 768 (1990)..... 1, 3

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959)..... 4

NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104 S.Ct. 2948 (1984)..... 2

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S.Ct. 2613 (1985)..... 1

Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 111 S.Ct. 401 (1990)..... 6

U.S. v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321 (1966)..... 4

U.S. v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126 (1972)..... 6, 7

REPLY ARGUMENT

I. THE RECURRING ISSUE PRESENTED BY THIS CASE IS WHETHER A MARKET SHARE SCREEN SHOULD BE USED IN HORIZONTAL BOYCOTT CASES WHERE THE BOYCOTT LIMITS PRICE AND SERVICE COMPETITION AND CONSUMER CHOICE

The lead argument in the brief of CFMA suggests that there is no confusion over when to apply the per se rule or the rule of reason to horizontal restraints, and there is no confusion regarding the nature of rule of reason analysis in horizontal boycott cases where the boycott prevents service and price competition.[1] According to CFMA those issues are controlled by this Court's opinion in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613 (1985). CFMA's argument fails to discuss two subsequent boycott decisions, *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009 (1986), and *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S.Ct. 768 (1990).

When these more recent opinions are read in conjunction with *Northwest Wholesale*, from a pragmatic,[2] substantive, perspective the issues have a single focus central to

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[1] CFMA also argues that Petitioner lacks standing. The CFMA brief is signed by new counsel who did not participate in or attend the oral argument before the Eleventh Circuit. This may explain why new counsel is apparently unaware that counsel for defendants abandoned the standing argument at oral argument before the Eleventh Circuit, and that the Eleventh Circuit abandoned standing as a basis for summary judgment.

[2] Debate over the prohibitive costs of antitrust enforcement under a rule of reason analysis continues today regarding the proposed Antitrust Health Care Advancement Act of 1996 (H.R.

Sherman Act litigation: When is use of a market share screen or proof of a relevant market required?

The Respondents' briefs admit there are three differing legal standards for the evaluation of the legality of group boycotts,[3] and horizontal restraints under Section 1 of the Sherman Act, generally, as described in the Petition for Certiorari.

CFMA clarifies that the boycotts in this case[4] are horizontal combinations of competitors who literally

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1925) (a bill which would require health care provider networks to be evaluated under the rule of reason). In analyzing the increased costs the Congressional Budget Office estimates that state governments would spend $5-15 million, and the federal government would spend $1-5 million more on enforcement. Presumably these substantial increases in cost would be due to having to prove market definition and market share, in contrast to a "quick look" rule of reason analysis under *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948 (1984), or *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009 (1986). See, CCH Trade Reg. Reports, No. 431, July 24, 1996.

[3] Respondents Healthchoice and ORHS acknowledge that "the precise application of the Court's standards of review of antitrust cases is often not easily applied . . . " [Brief of Healthchoice and ORHS p. 11].

[4] As noted in the Petition for Certiorari, Count I of the Complaint challenged a refusal to deal among competing doctor members of CFMA, through the "CFMA Rule Of Necessity" (limiting membership in CFMA), CFMA rules prohibiting CFMA doctors from referring to or consulting with nonmembers, and Healthchoice rules limiting patients from employing non CFMA doctors. Count III challenged a refusal to deal among ORHS doctors and hospitals who combined to suspend Petitioner's admitting privileges, emergency room privileges, and privileges to do medical procedures, thereby refusing to deal with him in any of those contexts.

refuse to deal with a competitor – historically the paradigm boycott situation.[5]

In particular, CFMA tries to distinguish the application of the *per se* rule in *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S.Ct. 768 (1990), stating that such case involved a situation where the victim of the boycott was a buyer whereas in the case at bar the victim was a competitor. CFMA also argues that in the case at bar the refusals to deal are accomplished directly by Respondents rather than through coercion of third parties.

These distinctions backfire, as they fly directly into the teeth of the primary characteristics of *per se* illegal boycotts – the literal direct concerted refusal to deal with a competitor. See, *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600, 34 S.Ct. 951 (1914) (victims of boycott were competing lumber dealers); *Fashion Originators' Guild Of America v. F.T.C.*, 312 U.S. 457, 61 S.Ct. 703 (1941) (victims of boycott were competing garment makers); *American Medical Assn. v. United States*, 130

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[5] At page 2 of their brief ORHS-Healthchoice contend, with no citation to the record, that Petitioner was suspended for concerns regarding quality of care of patients. The record totally refutes this unfounded comment. Beginning on page 19 of its brief ORHS-Healthchoice suggest Petitioner lost his staff priviliges as part of "peer review." This is incorrect. Petitioner was maliciously suspended despite a perfect quality assurance record based on 100% chart review. Moreover, ORHS did not even assert the Healthcare Quality Improvements Act of 1986, 42 U.S.C. § 11101 et seq., as a basis for summary judgment. Petitioner was suspended and defendants consequently refused to deal with him because according to them he was a "Jack Of All Trades," and "taking money out of our pockets."

F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943) (victims of boycott were competing doctors); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959) (victim of boycott was competing retail store); *U.S. v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321 (1966) (victims of boycott were competing car retailers).

Finally, when it is clear from the record that the target of the boycott was providing and would have provided superior service for a reduced aggregate fee, as Petitioner's documented extraordinary success demonstrates,[6] and the boycott is to eliminate that competitive

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[6] The success of Petitioner was both financial and professional. According to patient testimonials, Petitioner provided far better patient care than the community norm. Excerpts from a few letters from patients or their families are as follows: "[Dr. Levine] visited my mother frequently and *always* answered pages within seconds when he was called by the nurses." "The evening of her dismissal he spent more than two hours writing a very thorough and complete discharge summary. He also had all x-rays and reports copied so they could travel with my parents back to Illinois . . . [My mother's doctors in Illinois] couldn't believe that such extraordinary/thorough care is available to 'tourists.' They assured my father that Dr. Levine's care most definitely prevented my mother from the devastating effects of a stroke." (R4-110, Tab 7 pg. 00208-09).

"Dr. Levine, I have never in my life met a Dr. that has been so caring and compassionate . . . I really appreciate you understanding my financial situation and hopefully in the near future I can pay you . . . " (R4-110, Tab 7, pg 00213).

"Dear Ms. Gilliam [Hospital Administrator]: I was recently a patient at your hospital and even though I've already filled out your questionnaire I felt I should let you know about the excellent care that Dr. Scott Levine gave me while I was there. He is an excellent doctor and I really appreciate his aggressive

threat to price stabilizing activities, any attempt at justification at least becomes a jury issue. In other words, Petitioner's meteoric success is direct evidence of the anticompetitive motive and effect of Respondents' conduct. Only in a command economy would such success be a purported justification for the elimination of a competitor.

II. PETITIONER IS NOT CHALLENGING ALL JOINT SELLING VENTURES OR ALL MANAGED CARE SYSTEMS

Respondents claim that they closed membership and then refused to deal with Petitioner and others to encourage competing doctor members to charge lower fees in exchange for reduced competition. There are three problems with that purported justification: (1) there is no evidence whatsoever that fees charged by CFMA members, which admittedly are uniform, are "discount." Respondents have failed to demonstrate that their fees are in fact lower than those charged, for example, to patients of capitated healthcare plans, or to medicare patients, or any other category of patient. The evidence introduced by Petitioner is that noncapitated fees are higher than normal, not discounts. See, New York Times Article "Health Plans Force Changes In the Way Doctors Are Paid," February 9, 1995, attached to REPLY BRIEF OF APPELLANT to the Eleventh Circuit; (2) there is no evidence whatsoever that CFMA members would not charge

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care. All three doctors were good, but Dr. Levine was the best. I owe my fast recovery to him. . . . " (R4-110, Tab 7, pg. 00225).

allegedly "reduced fees" without the CFMA Rule Of Necessity, and the evidence is that CFMA and Healthchoice for years had no such rule, grew rapidly, and were open to all providers; (3) and, there is no evidence that aggregate fees, not merely fee schedules, are reduced by CFMA's refusal to deal and in fact the prohibition of referrals to non-CFMA members prevents price competition and promotes heightened use of CFMA specialists at greater costs.

As in *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126 (1972), the issue is not whether the existence of a PPO or joint selling arrangement can be justified, but rather whether the challenged constellation of anticompetitive practices has been justified; the answer in this case, as in *Topco* and in *Palmer v. BRG*, 498 U.S. 46, 111 S.Ct. 401 (1990) (which also involved a joint selling arrangement), clearly is "no."

III. RESPONDENTS' ARGUMENT THAT CFMA DID NOT PROMULGATE THE "RULE OF NECESSITY," IS REFUTED BY THE DOCUMENTARY RECORD

At page 7, paragraph 3 of its brief ORHS-Healthchoice asserts that Petitioner made a misstatement of fact when he said the Rule of Necessity was promulgated by CFMA. According to Healthchoice's brief, "[t]he Rule of Necessity . . . was promulgated by Healthchoice . . . [and] [t]he Rule of Necessity is administered by the staff of Healthchoice . . . " Respondents' own documents refute this statement by Healthchoice. Attached to the REPLY BRIEF OF APPELLANT before the Eleventh Circuit is a document produced by Respondents. It is entitled:

"CFMA RULE OF NECESSITY." It discusses that only in very limited circumstances of necessity will additional doctors "be credentialed for membership in CFMA's physician panel." It emphasizes that those doctors will have to agree to be bound by the "same contract fees . . . as other physicians on the CFMA physician panel.[7]" Healthchoice is not mentioned in this document.

IV. CFMA AND HEALTHCHOICE ARE INSTRUMENTALITIES OF EACH OTHER

CFMA and Healthchoice Boards of Directors overlap. At least four members of the Board of Directors of Healthchoice (R4-110-Tab 32 at 100077) are members of the Board of Directors of CFMA, which requires adherence by CFMA members to the fee schedule.[8] (Smith Dep. 7/21/93 pp. 11-13). Moreover, the executive staff and offices of Healthchoice are identical to those of CFMA. (Smith Dep. 8/94; Neder Dep. p. 14).

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[7] At page 5 of its Brief, CFMA points out that CFMA is not owned by the hospital, but rather "CFMA is owned by its physician members . . . " Even though CFMA was originated by the hospital parent, Petitioner appreciates this correction. As discussed herein, ownership and voting control of CFMA by the competing doctor members unquestionably makes that organization a horizontal combination under section 1 of the Sherman Act. See e.g. *Topco*, supra.

[8] Healthchoice's assertion that the Boards of Directors are not interlocking is wrong. In her deposition, Nancy Smith, an employee of ORHS and Executive Director of Healthchoice, (Smith Dep. 7/21/93 at p. 1), testified that at least four individuals were members of both the Healthchoice and the CFMA boards of directors – Neder, Galceran, Stephens and Kessell. (Smith Dep. 7/21/93 at pp. 12-13).

Dr. Neder was the president of CFMA and on the Board of Directors of both CFMA and of Healthchoice. (Neder dep. pp. 6-9). The identity of CFMA and Healthchoice is so lacking in separation that Dr. Neder thought CFMA was a PPO and that Healthchoice was not a PPO, but just did "sort of marketing." (Neder dep. p. 6). Dr. Neder also testified that Dr. Galceran was on the Board of Directors of both Healthchoice and CFMA. (Neder dep. pp. 6-9). Dr. Galceran was also the Chief of Staff at Sand Lake Hospital (R4-95-12-13), and was the person who intitiated Petitioner's unfounded suspension immediately after Petitioner made efforts to open CFMA to competing doctors. Dr. Galceran also added a new internist in his office to the CFMA membership immediately after suspending Petitioner. (R4-110-Tab 1, 4, 6, 10-12). The stock in CFMA is owned by the doctor members of CFMA. (Neder dep. p. 12).

Accordingly, Respondents' attempt to argue that Healthchoice is similar to an independent insurance company lacks credibility.

V. PETITIONER PLAINLY RAISED PRICE-FIXING IN BOTH LOWER COURTS, AND THE ELEVENTH CIRCUIT'S REJECTION OF THAT CLAIM SHOULD BE SUMMARILY REVERSED OR VACATED

The Respondents do not contest that the Eleventh Circuit ignored at least 60 years of antitrust jurisprudence when it held that the fixing of only one factor of a two factor price "is a kind of 'price fixing,' but it is a kind that the antitrust laws do not prohibit." 72 F.3d at 1548.

Rather, page 20 of the ORHS-Healthchoice brief suggests Petitioner did not assert price fixing in his complaint.[9] ORHS-Healthchoice have not read the complaint closely. Count I is captioned "CONSPIRACY TO UNREASONABLY REDUCE THE AVAILABILITY OF AND COMPETITION IN SERVICES TO CONSUMERS OF MEDICAL SERVICES." Paragraph 27 further asserts: "The policies and practices of CFMA in conspiracy with its members, with Healthchoice, and with others have . . . reduced price competition."

As in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925 (1980), and *Palmer v. BRG*, 498 U.S. 46, 111 S.Ct. 401 (1990), and as requested by the Solicitor General in each of those cases, this Court should summarily reverse or vacate the decision below.

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[9] Moreover, CFMA contends at page 18 of its brief that CFMA and its members had no involvement in the price fixing combination. That is refuted by the record as discussed above. Respondents do not deny that CFMA requires members to adhere to the Master Payor Rate Schedule, resulting in uniform fees by CFMA members. Moreover, as cited above the actual staff who establish the fees, as well as members of the boards of directors, are agents of both CFMA and Healthchoice.

CONCLUSION

The Petition For Certiorari to review the judgment of the United States Court Of Appeal for the Eleventh Circuit should be granted.

Respectfully submitted,

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